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The amendments to the temporary regulations governing passive activity losses were published in **55 Fed.**

**Reg. 6980 (Feb. 28, 1990).** See P. 74 *supra*.

**True v. U.S., 894 F.2d 1197 (10th Cir. 1990) (investment tax credit).** See p. 67 *supra*.

## SOCIAL SECURITY TAX AND IMMIGRATION REQUIREMENTS IN HIRING OF FAMILY MIGRANT FARM LABOR

by Robert Achenbach

### Social Security Tax.

**Employees.** For cash remuneration<sup>1</sup> paid after 1987, an employer is required to withhold an employee's share of social security taxes (7.65 percent for 1990) if \$150 or more is paid to an employee or \$2,500 or more is paid to all employees during a year for agricultural labor.<sup>2</sup> For 1990, up to \$51,300 of wages are subject to social security tax withholding.

**Independent contractors.** Cash remuneration paid to an independent contractor for agricultural labor is not subject to withholding of the contractor's share of social security tax and the payor is not required to pay the contractor's or an employer's share of social security tax. Instead, the payor is required to file information Form 1099 MISC and the laborer may be required to report the income as self-employment income and pay social security tax on that amount.<sup>3</sup>

**Crew leaders.** Crew leaders are considered independent contractors for social security tax purposes.<sup>4</sup> Crew leader is defined by the Internal Revenue Code 1986 as follows:

"The term 'crew leader' means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person; and such individuals furnished by the crew leader to perform agricultural labor

for another person shall be deemed to be the employees of such crew leader. For purposes of this chapter and chapter 2, a crew leader shall, with respect to service performed in furnishing individuals to perform agricultural labor for another person and service performed as a member of the crew, be deemed not to be an employee of such other person."<sup>5</sup>

Thus, when a farmer hires a family of migrant farm laborers through one of the parents, a major concern of the farmer is determining whether an employment relationship exists. If the family of workers are all considered employees of the farmer and either the farmer pays any employee over \$150 in wages or the farmer pays over \$2,500 in wages for agricultural labor during the year, the wages are subject to social security tax withholding and payment by the farmer. If the parent who negotiates with the farmer is considered a crew leader furnishing the "crew" of the rest of the family, the parent is an independent contractor and the farmer is not required to withhold or pay social security tax on amounts paid for the labor.

*Sachs v. United States*,<sup>4</sup> involved the hiring of families of migrant farm workers to maintain and harvest sugar beet, cucumber and tomato crops. The families were paid on a per hour basis with payments made to the head of each family who provided necessities for the family members and paid each member an allowance. The court held that the heads of the families were not crew leaders and that all family members were employees of the farmer. The court examined the definition of "farm labor contractor" under the Farm Labor Contractor Act of 1963 (now the Migrant and Seasonal Agricultural Workers Act)<sup>5</sup> which excluded from farm labor contractors individuals who recruited members of their own family.

**Alien agricultural labor.** Agricultural labor performed by citizens from foreign countries temporarily admitted to perform agricultural labor is

excluded from the definition of employment for social security tax purposes.<sup>6</sup> Illegally admitted agricultural workers, however, are subject to social security tax and employers are required to comply with the withholding and tax payment provisions.

A farm employer is required to obtain every employee's social security account number.<sup>7</sup> If the employee does not furnish an account number, the employee is to supply the following information to the employer on a signed and dated Form SS-5—

(1) the employee's full name, address, date and place of birth,

(2) the full name of the employee's father,

(3) the employee's mother's full name before marriage, and

(4) a statement as to where and when a Form SS-5 was previously filed.<sup>8</sup>

The employee is still required to file a Form SS-5 application and the employer is required to advise the employee of that requirement.<sup>9</sup>

If the employee has not furnished the employer with an account number by the time payment of withheld social security taxes are to be paid, the employer is to provide the above information on a Form SS-5 or in a written statement and state whether an application for an account number has been filed or provide a statement as to why the above information has not been obtained.<sup>10</sup>

### Immigration Law

Under the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, substantial monetary penalties and possible imprisonment may be imposed if a farmer knowingly hires or continues to employ an alien not lawfully admitted to the United States.<sup>11</sup>

Because the penalties are based on a farmer knowingly hiring an illegal alien, the farmer need only comply with the verification requirements to avoid

punishment in the event an agricultural worker is unlawfully in the United States.

The farmer employer is to use INS Form I-9 to document verification of employment eligibility of the laborer.<sup>12</sup> The individual seeking employment is to present either (1) a document which establishes identity and employment eligibility or (2) a document establishing identity and a document establishing employment eligibility.<sup>13</sup> The verification is to be completed and INS Form I-9 filled out within three business days of the employee's commencement of work or, if the employment lasts less than three days, by the end of the first working day.<sup>14</sup> The verification is valid for three years, even if the employment is not continuous.<sup>15</sup>

Documents which satisfy the identity and employment eligibility requirements are:

- (1) a current U.S. passport,
- (2) a certificate of U.S. citizenship,
- (3) a certificate of naturalization,
- (4) an unexpired foreign passport with an unexpired Attorney General endorsement for work in the U.S. or an unexpired Form I-94 authorizing employment,
- (5) a resident alien card (INS Form I-551) or registration card (INS Form I-151) with a photograph and employment authorization,
- (6) a temporary resident card (INS Form I-688), or
- (7) an employment authorization card (INS Form I-688A).<sup>16</sup>

A birth certificate or social security card may be used to prove employment eligibility but requires some additional proof, such as a driver's license or other state identification card with a photograph, that the document belongs to the person presenting it.<sup>17</sup>

For individuals 16 years or older without a valid driver's license, the following identification materials may be used:

- (1) a school identification card with a photograph,
- (2) a voter's registration card,
- (3) a U.S. military card or draft record,

(4) an identification card used by government agencies,

(5) a military dependant's identification card,

(6) native American tribal documents,

(7) U.S. Coast Guard Merchant Mariner card, or

(8) a Canadian driver's license.<sup>18</sup>

For individuals less than 16 years old, the following identification materials may be used:

- (1) a school record or report card,
- (2) a clinic doctor or hospital record, or
- (3) a daycare or nursery school record.<sup>19</sup>

Documents sufficient for establishing employment eligibility include:

- (1) an original social security card, unless "not valid for employment purposes" is printed on the front,
- (2) an original or certified copy of a state, county or city birth certificate with an official seal,
- (3) an unexpired INS employment authorization,
- (4) an unexpired re-entry permit (INS Form I-327),
- (5) an unexpired refugee travel document (INS Form I-571),
- (6) a certificate of birth issued by the Department of State (Form FS-545),
- (7) a certificate of birth abroad issued by the Department of State (Form DS-1350),
- (8) a U.S. citizen identification card (INS Form I-197),
- (9) a native American tribal document, or
- (10) an identification card for use of a resident citizen in the U.S. (INS Form I-179).<sup>20</sup>

Upon expiration of any employment eligibility document, the employer is required to update INS Form I-9 to reflect that the employee is still authorized to work in the U.S.

Employers need only keep a copy of the INS Form I-9 but should retain any copies may of identity or employment eligibility documents obtained.<sup>21</sup> The Form I-9 is to be retained for the later of three years after the hiring of the

employee or one year after termination of the employee.<sup>22</sup>

**Conclusion.** Farm employers who hire migrant family farm labor can use INS Form I-9 and social security form SS-5 to collect and record the information necessary to comply with social security and immigration regulations.

## FOOTNOTES

<sup>1</sup> See Harl, "Paying Wages in Kind for Agricultural Labor," p. 53 *supra*.

<sup>2</sup> I.R.C. § 3121(a)(8)(B). See "Definition of Agricultural Labor for Federal Tax Withholding Purposes," p. 54 *supra*. For additional discussion of social security tax liability of employers, see Harl, **Agricultural Law** § 36.02 (MB 1990).

<sup>3</sup> I.R.C. § 1401. See Radcliff v. Comm'r, T.C. Memo. 1990-122, p. 82 *supra*. See Harl, **Agricultural Law** ch 37 (MB 1990).

<sup>4</sup> I.R.C. § 3121(o).

<sup>5</sup> *Id.* The court in Sachs v. United States, 422 F. Supp. 1092 (N.D. Ohio 1976), discussed *infra*, also looked to the definition of "farm labor contractor" under former 7 U.S.C. § 2042(b) (now 7 U.S.C. § 1802(7)) for purposes of determining whether a parent of a family of migrant farm laborers was a crew leader for purposes of social security taxes.

<sup>6</sup> 422 F. Supp. 1092 (N.D. Ohio 1976).

<sup>7</sup> 7 U.S.C. § 1802(7).

<sup>8</sup> I.R.C. § 3121(b)(1).

<sup>9</sup> Treas. Reg. § 31.6011(b)-2.

<sup>10</sup> Treas. Reg. § 31.6011(b)-2(b).

<sup>11</sup> Treas. Reg. § 31.6011(b)-2(c).

<sup>12</sup> Treas. Reg. § 31.6011(b)-2(c)(3)(iii).

<sup>13</sup> 8 U.S.C. § 1324a(a).

<sup>14</sup> 8 C.F.R. § 274a.1. INS Form I-9 is available from local offices of the INS or from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20410, ph. (202) 783-3238.

<sup>15</sup> 8 C.F.R. § 274a.2(b)(v).

<sup>16</sup> 8 C.F.R. § 274a.2(b)(1)(iii).

<sup>17</sup> 8 C.F.R. § 274a.2(b)(viii), (c), (d).

<sup>18</sup> 8 C.F.R. § 274a.2(b)(v)(A).

<sup>19</sup> 8 U.S.C. § 1324a(b)(1)(D).

<sup>20</sup> 8 C.F.R. § 274a.2(b)(1)(v)(B).

<sup>21</sup> *Id.*

<sup>22</sup> 8 C.F.R. § 274a.2(b)(1)(v)(C).

<sup>23</sup> 8 C.F.R. § 274a.2.

<sup>24</sup> 8 C.F.R. § 274a.2(b)(2).